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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of ROBERTA and DENNIS FITZPATRICK.	
ROBERTA FITZPATRICK, Respondent, v. DENNIS FITZPATRICK, Appellant.	G034764 (Super. Ct. No. 00D011415) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Salvador Sarmiento, Judge. Affirmed in part; reversed in part and remanded with directions.

Law Office of Dennis F. Minna; Law Office of Nigel Burns, Nigel Burns and Benjamin Arsenian, for Appellant.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Respondent.

Dennis Fitzgerald appeals from a judgment which addressed and resolved marital property disputes arising out of the dissolution of his marriage to Roberta Fitzgerald. Dennis asserts the court erred with respect to eight different issues. We conclude Dennis' rather cursory effort on appeal is insufficient to establish any error with respect to seven of the eight issues he raises.

The one issue raised by Dennis which appears meritorious is his contention the court mistakenly concluded Roberta had withdrawn only $3,000 from the parties' Washington Mutual bank account on the date of their separation, rather than $8,000 as demonstrated by the undisputed evidence. He seeks a modification of the judgment, reflecting he is entitled to $4,000, rather than the $1,500 awarded by the court, as an equalizing payment for that withdrawal. We agree, reverse the judgment, and remand the case to the trial court with directions to modify the judgment in that one respect. In all other respects, the judgment is affirmed.

* * *

According to Dennis' opening brief, the salient facts in this case are these:

"[Roberta] and [Dennis] were married on June 21, 1982 and separated on December 7, 2000. The parties were married for 18 years, 5 months. There are no minor children born out of the marriage between the parties.

"Both [Dennis] and [Roberta] were in their early fifties at the time of their separation and [Roberta] was working for a company, [Dennis] was self employed and working at home as a day trader, which he ceased doing in early of 2001 as a result of not making any money. Thereafter [Dennis] was diagnosed with prostate cancer and disabled from work at the time of the trial."

And that is it. That is the entire statement of facts provided by Dennis. Moreover, Dennis supports this stunningly terse summary with no citations to the record – such as it is. While Dennis does provide a comprehensive reporter's transcript, the clerk's transcript he provides consists of a total of 31 pages, only 12 of which relate to the

proceedings in the trial court.[1] The clerk's transcript does not include the dissolution petition, nor any other pleading, briefs or documents filed prior to the commencement of the final hearing in this case. Significantly, it also fails to include the parties' stipulation for partial judgment, which resolved some of their disputed property issues prior to the final hearing.

We do have a copy of the stipulation, but only because Roberta filed a request to augment our record with it. The stipulation provides, in pertinent part, that "[u]pon completion of [an] appraisal, Husband shall have 120 days to purchase wife's share of the equity in [the family] residence. Said property being free of encumbrances, wife's share of the equity shall be 50% of the appraised value. [¶] [] If Husband cannot purchase wife's equity within 120 days . . . . then said residence is ordered listed for sale forthwith . . . .[¶] [] All pension, retirement, 401k savings plans, IRA accounts stock, ESOP's, etc., earned by either party through employment from date of marriage to date of separation shall be divided pursuant to the rule [in] *In re the Marriage of Brown.*"

I

Dennis asserts the court committed eight errors – seven in its division of the parties' marital property, and one in its award of spousal support to him. What Dennis does not do is make any significant effort to elucidate the specific nature of the court's alleged errors. Instead, he characterizes five of them, in the most generic terms, as "a mistake of fact, mistake of law, and/or abuse of discretion." One of the issues he narrows down to either a "mistake of law and/or abuse of discretion"; and two others he is able to describe specifically as a "mistake of fact" and an "abuse of discretion" respectively.

It is Dennis' obligation to affirmatively demonstrate trial court error (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699; *Denham v.*

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[1] The clerk's transcript provided by Dennis consists of only two minute orders – one from the first day of trial, and one reflecting the court's decision in the case; the judgment and notice of entry, and documents relating to the appeal.

Superior Court (1970) 2 Cal.3d 557, 564); he does not fulfill that obligation by merely offering us a smorgasbord of options, hoping we will be enticed by some of the choices. Consequently, we will ignore Dennis' lists of potential errors, and focus only on the substance of his arguments, to ascertain whether he actually demonstrates any *particular* error.

Further complicating our effort to evaluate Dennis' claims is his near-total abandonment of his obligation to provide us with the significant facts in the case. Not only did he fail to include any meaningful statement of facts in his brief, he failed to support the one he did provide with any citations to the record. As noted above, the "statement of facts" section of his brief contains but two paragraphs; leaves out the most significant fact in the case (the parties' stipulation); fails to set forth the terms of the judgment to which he objects; and includes no citations to the record. This effort is insufficient to comply with the requirements of California Rules of Court, rules 14(a)(1)(c) and 14(a)(2)(c).

The argument portions of Dennis' opening brief do contain some additional discussion of facts, including a few citations to the record, but with the exception of the one issue we agree warrants reversal, his effort is nothing like an attempt to summarize the entirety of evidence pertaining to each issue. Instead, Dennis discusses each issue as if it were decided in a vacuum, separately from all other issues in the case, and with only a spare, one-sided recitation of the evidence supporting his position with respect to that particular issue.

Of course, as no statement of decision was either requested or given, we must presume the court found all facts necessary to support each of the challenged aspects of its judgment. (*Ellena v. State of California* (1977) 69 Cal.App.3d 245, 254.) Consequently, in order to prevail on any of his contentions that the court erred factually, Dennis was required to provide the appellate court with "[a] fair statement of all the evidence, *including that supporting the judgment*, . . . or else the issue may be deemed

waived. (*State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1625, fn. 4; *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.)" (*Valentine v. Read* (1996) 50 Cal.App.4th 787, 796, italics added.)

As explained in *Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 403, "'It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reviewing court is not called upon to make an independent search of the record where this rule is ignored. [Citation.]' [Citation.] 'A claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evidence was received on behalf of the respondents. *Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner.*' [Citation.]" (Italics added.)

In light of Dennis' insubstantial effort to demonstrate the factual predicate for most of his arguments, and our obligation to *presume* the record supports whatever factual findings – either express or implied – that the court needed to make in support of its judgment, we conclude Dennis waived all but one of his contentions that the court erred factually. With that in mind, we turn to his arguments of abuse of discretion and legal error.

II

Dennis first asserts the court erred in "refusing" to reimburse him for his alleged separate property contribution to the acquisition of the parties' family residence. In support of that contention, he cites to a portion of the reporter's transcript

demonstrating his counsel *argued* that he should be entitled to the reimbursement, but not to any *evidence* supporting the contention.

Moreover, our own review of the transcript reflects that Roberta objected to any such request at the trial level, on the specific basis that the parties' stipulation for partial judgment had *expressly* provided she would be entitled to one-half of the equity in the residence – exactly what the court awarded to her. Dennis' attempt to challenge that award, without even acknowledging the existence of the partial judgment, is certainly more disappointing than it is persuasive. We find his argument on this point wholly unmeritorious.

III

Dennis next argues the court erred in failing to make an express division of the parties' automobiles, despite the fact that Roberta's vehicle had a fair market value of $21,000 and his had only a fair market value of $5,000. He asserts, based upon Family Code section 2550, that court should have awarded him $8,000 in cash to "equalize" the value of those vehicles.

Dennis does not, however, cite to any evidence in the record demonstrating he ever *requested* such an equalizing payment during the trial, nor that he ever brought the asserted omission to the court's attention, through some posttrial procedure. His failure to raise the issue below waives the issue for purposes of appeal. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc*. (2002) 102 Cal.App.4th 765, 783.)

In any event, were we to consider the issue now, we'd have to reject the contention, as Dennis has also failed to acknowledge, let alone dispose of, the possibility that Roberta's car, while having a greater *market* value, might also be security for an outstanding loan obligation, such that its *net* value is no greater than that of Dennis' car. As a consequence, Dennis has not sustained his burden of establishing that the court's failure to expressly address the issue of the vehicles was error.

IV

Dennis next contends the court erred in ordering Roberta "to pay to [Dennis] the sum of $1,500.00 forthwith as reimbursement of the community funds withdrawn from the Washington Mutual account prior to date of separation." Dennis asserts this was "a clear mistake of fact"[2] because the only evidence on the point was that Roberta withdrew $8,000, rather than $3,000, from the Washington Mutual account.

Roberta suggests the evidence pertaining to the amount of her withdrawal was actually disputed, pointing to another portion of the transcript in which her withdrawal of "$3,000 [or] $3,200" was discussed. But Roberta's evidence pertains to money withdrawn from a "Wells Fargo" account, not the Washington Mutual one. Consequently, she fails to cite any evidence which either disputes the evidence relied upon by Dennis, or supports the court's implicit conclusion that Roberta's withdrawal from Washington Mutual was in the amount of $3,000.

Nor can we agree with Roberta's complaint that Dennis has once again cited only "his" evidence in support of a point. On this particular point, Dennis' contention is that the evidence he relied upon *was* the only evidence – he cannot be faulted for that.

We are likewise unpersuaded by Roberta's suggestion that Dennis waived the issue by failing to seek a posttrial correction at the trial court level. Because the court made a specific ruling as to this particular issue, we must presume that (in contrast to the automobile issue) it was actually raised below. And if an issue is raised, the court has a duty to rule on it in accordance with the evidence presented.[3]

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[2] This is one of only two issues in which Dennis actually specifies the nature of the court's alleged error.

[3] Of course, had Dennis sought some posttrial relief below, in the wake of the erroneous ruling, he might have achieved a more efficient resolution of the problem. Such efforts can also be effective as a means of establishing grounds for an appellate attack. But we are unaware of any requirement that he do so in order to preserve the issue on appeal, and Roberta cites none.

Finally, the court's ruling was clear and specific to this particular issue. Its determination that Dennis was entitled to $1,500, as "reimbursement of the community funds withdrawn from the Washington Mutual account," when viewed in light of Family Code section 2550's requirement that property be divided "equally," necessarily implies that the total amount of Roberta's withdrawal was $3,000. That was a mistake of fact, and the judgment must be modified to reflect Dennis' entitlement to reimbursement based upon the entire $8,000 withdrawal.

V

Dennis next contends the court erred in failing to order Roberta to reimburse him for what he contends was approximately $3,000 in separate property funds he expended, after separation, to make repairs and pay taxes on the parties' boat. He cites a total of 23 lines of the reporter's transcript to support his contention that he made the payments. That evidence does not, however, support his contention the funds expended were his separate property.

Moreover, although Dennis expressly contends he "did not waive his right to seek reimbursement," he cites absolutely nothing, neither evidence nor legal authority, to support that contention. We will consequently presume, in support of the court's decision expressly refusing to address the issue, that he did. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 649.)

In any event, even the very brief portion of the record relied upon by Dennis suggests he had the exclusive use of the boat during the post-separation period. His own testimony suggests he exercised control over it, and he expressly claims that during "the season," he put the boat in the water, and spent "every weekend" there, purportedly in an attempt to sell it. Based upon that evidence, the court could have impliedly concluded Dennis got substantial benefits from ownership of the boat, which Roberta did not, during the post-separation period. Such benefits may have equalized his alleged separate property expenditures.

VI

Citing *In re Marriage of Epstein* (1979) 24 Cal.3d 76, Dennis also contends the court erred in failing to order Roberta to reimburse him for amounts he spent paying off balances owed on a community credit card. According to Dennis, at the time of the parties' separation he used separate funds to pay approximately $787.00 owed on the credit card. He asserts Roberta should have been held responsible for half of that payment. He also contends Roberta took out a cash advance of $3,200 on the same credit card, which she then used as her sole and separate property. Dennis paid off that advance with his separate property, by making minimum monthly payments over an apparently lengthy period – in a total amount of $7,236.22.

There are several problems with these contentions. First, Dennis offers no context for his payment of the $787.00; indeed, he fails to support this particular claim with *any citation to the record*. We have no basis to conclude from his brief that he even made the payment, let alone any understanding of the timing or circumstances surrounding it. We have no idea whether, for example, Roberta might have paid an offsetting balance on another credit card. Nor does Dennis offer us any information regarding how or when the balance was incurred – for all we know, Dennis took the money in a cash advance of his own, just prior to the separation, which he then used as his sole and separate property.

With respect to the purported cash advance, Dennis likewise offers no factual context; he cites only five lines of testimony in the reporter's transcript to support his assertion that Roberta took the cash advance, and fails to tell us so much as the *date* on which this advance was taken.[4]

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[4] The five lines, taken from Dennis' testimony, are as follows: "Q: On your property declaration, Exhibit A, you show under item 12, a Wells Fargo cash advance $3,200.
"A: Yes.
"Q. Now, who took that cash advance?
"A. The petitioner."

Moreover, while Dennis asserts "there is nothing in the record which suggests [the $3200] was used to pay a community property debt," that is a far cry from saying the evidence indisputably demonstrated it was not. Just for starters, Dennis was required to demonstrate the latter. He did not.

Similarly, Dennis offers no authority for his implicit contention that Roberta should be held responsible for half of what he ultimately *paid*, rather than half of the original amount. We have no idea whether minimum payments were Dennis' only option, or whether he even notified Roberta of his assertion that the debt was hers alone, and gave her the option of paying it off, perhaps on more favorable terms.

Finally, as legal authority for his reimbursement claim, Dennis cites Family Code section 914, subdivision (b), which provides that when a married person applies his separate property to satisfaction of a marital debt for which the person is personally liable, and does so "*at a time when nonexempt property in the community estate or separate property of the person's spouse is available but is not applied to the satisfaction of the debt*," (italics added) he is entitled to reimbursement. Of course, Dennis has made no attempt to establish the factual predicate for application of the statute.

We consequently cannot conclude the court erred in failing to order Roberta to reimburse Dennis for his asserted payment of whatever balances might have existed on the credit card.

VII

Dennis also asserts the court erred in failing to credit him for what he contends were in excess of $6,500 in separate property funds he spent to pay taxes on the family residence, and in excess of $1,400 in separate property funds he spent to maintain insurance on the residence. Once again, Dennis cites to but a few lines of the reporter's transcript to support his contention. And once again, that evidence does not actually support the facts he asserts. With respect to the property tax, the five lines Dennis relies upon establish only that the "total" amount for "O.C. Tax Collector," representing the

"secured property taxes for [the] family residence," was $6,542.48. What the cited transcript does not do is demonstrate Dennis actually made any such payment, or when he might have done so, let alone that he did so with "separate property funds."

With respect to the insurance issue, the seven lines cited by Dennis evidence that he paid $769.08 for "house insurance" on September 10, 2001, and that "on 12/02 there is an amount of $631.55, for a total of $1,420.43." This evidence does not establish Dennis made the second payment, or that either payment was made with his separate property funds.

In addition to Dennis' failure to cite sufficient evidence to actually support the assertions he has made, he has also failed again to cite any authority for his assertion he "did not waive his right to seek reimbursement." And once again, where the court failed to address the issue at all, we must presume that he did. (*In re Marriage of Ditto, supra* 206 Cal.App.3d 643, 649.)

Dennis does point out that Roberta's counsel had indicated to the trial court that Dennis might be entitled to reimbursement for the amounts he expended for residential taxes and insurance, if he could substantiate those expenditures with canceled checks. However, that conditional concession is of no benefit to Dennis, as he points to no evidence he ever provided the canceled checks.

Finally, we note that the trial court expressly found the family residence to have had rental value from 2001 until 2004, when the hearing took place, and ordered that Dennis reimburse Roberta for that rental value. Clearly, although Dennis does not acknowledge the fact, he continued to reside in the home after the separation. The court may have consequently concluded, implicitly, that whatever expenditures he made toward taxes and insurance were incident to his continued occupancy.

For all of these reasons, we conclude Dennis has failed to demonstrate error on this point.

VIII

Dennis next finds fault with the court's failure to award him half of Roberta's $7,900 in "'time bank' from Texas Instruments in 2001." Dennis does not explain exactly what that is, but we will assume Texas Instruments was Roberta's employer, and according to Roberta's cited testimony, the "time bank" money was a payment for Roberta's unused vacation or sick leave time. We need not delve too deeply into the issue, as Dennis' has offered evidence of only the bare fact that Roberta received the funds. He has not offered any evidence to establish the funds were necessarily community in character.

Similarly, Dennis has not even asserted, let alone established, that he sought a share of that payment during the trial court proceedings. As the court failed to address the issue at all in its decision, we must presume it was waived.

IX

Finally, Dennis asserts the court abused its discretion in awarding him a low amount of spousal support, which he contends was based upon an outdated impression of his earning capacity from four years previously, and despite uncontradicted evidence he was no longer working, and that he was unable to work due to medical disabilities.

We are unpersuaded. The court's reference to Dennis' earnings as a day trader in prior years was not inappropriate, as he contends. Indeed, in the cited portion of the transcript, the court did not impute any specific level of earnings to Dennis based upon what he had earned four years previously. Rather, all the court did was explain why it was not persuaded by Dennis' contention he had never earned any money as a day trader. The court noted that in a declaration Dennis filed in December of 2000, he had asserted that the parties bought their boat with his day trading earnings, and that "'one year our income went from $160,000 to about $250,000, as a result of my day trading.'" Based upon that evidence, the court determined Dennis actually was able to make money

as a day trader, and that he was not disabled from doing so. That determination was appropriate.

Moreover, Dennis' assertion he was actually "unable to work" is based upon a fairly obvious attempt to distort the evidence. Dennis supports his contention with but a single excerpt from the testimony of his expert witness. In our view, that expert testimony stops far short of demonstrating Dennis is "unable to work." In the cited excerpt, the expert was asked two things: first would a job in which Dennis sat at a desk, "just answering phones," put him on disability? The expert answered that it would. He was next asked: "if [Dennis had] a job that required him to stand . . . for, say, an eight-hour shift, would he qualify?" The expert responded, "I don't see it happening."

Of course, most jobs do not require one to sit, or stand, *exclusively* for eight hours straight. Roberta's counsel recognized that, and immediately cross-examined the expert by asking this question: "Isn't it true that someone with [Dennis'] type of injury can sit and stand alternating; you can't sit for eight hours or stand for eight hours; you can move around and do things to relieve the pain; isn't that true?" The expert responded "*That is true.*" (Italics added.) Dennis' failure to acknowledge that additional testimony, which severely undercuts his assertion he was "unable to work," demonstrates once again just how irresponsible he has been in selectively presenting the evidence in this appeal.

As we have already explained above, Dennis was required to provide us with "[a] fair statement of all the evidence, *including that supporting the judgment*, . . . or else the issue may be deemed waived." (*Valentine v. Read, supra*, 50 Cal.App.4th 787,796, italics added.) On this issue of spousal support, in which the court's exercise of discretion in setting the amount was necessarily complex and fact-intensive, an appellant's violation of this rule is particularly problematic. Consequently, we conclude the issue is waived.

The judgment is reversed, and the case is remanded to the trial court with directions to modify the judgment so as to reflect Dennis is entitled to $4,000, rather than

$1,500, as reimbursement on account of Roberta's withdrawal of $8,000 from the parties' Washington Mutual account. In all other respects, the judgment is affirmed. Roberta is to recover her costs on appeal, and on remand may apply to the trial court for an additional award of attorney fees incurred in connection with this appeal. The trial court, in its discretion, may grant or deny such application, and if granted, shall determine an appropriate amount of such an award.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.